

Testimony of Representative Jerrold Nadler
Subcommittee on Courts and Competition Policy
Hearing on H.R. 4115, the “Open Access to Courts Act”
Wednesday, December 16, 2009

Chairman Johnson, Ranking Member Coble, and other distinguished Members of the Subcommittee on Courts and Competition Policy, thank you for holding today’s hearing on H.R. 4115, the “Open Access to Courts Act,” which I introduced with Chairman Johnson and Chairman Conyers on November 19th.

The Supreme Court’s decision in *Ashcroft v. Iqbal* was the subject of a hearing I chaired in the Subcommittee on the Constitution, Civil Rights, and Civil Liberties on October 26th entitled “Access to Justice Denied: *Ashcroft v. Iqbal*.” It is the legislative response to that hearing’s findings that brings us here today.

What is really significant about the *Iqbal* decision is that it sets up a very stringent new standard that prevents people from having their day in court. It does so, not based on the evidence, or on the law, but on the judge’s own subjective criteria.

Rights without remedies are no rights at all. All Americans are entitled to have access to the courts so that their claims can be heard, the evidence weighed, and their rights can be vindicated. Without recourse to the courts, our rights are merely words on paper.

In *Iqbal*, the Court established a new test that federal judges must use when ascertaining whether civil complaints will withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Rather than questioning, as required under Rule 8(a)(2), only that the plaintiff had included a “short and plain statement of the claim showing that the pleader is entitled to relief,” it dismissed the case, not on the merits, or on the law, but on the bald assertion that the claim was not “plausible.”

In the past, the rule had been, as the Supreme Court stated in *Conley v. Gibson*, that the pleading rules exist to “give the defendant fair notice of what the ... claim is and the grounds upon which it rests” not as a substantive bar to consideration of the case. Now the Court has required that, prior to discovery, courts must somehow assess the “plausibility” of the claim, dismissing claims the court finds not “plausible” – before discovery, and without submission of evidence.

This rule will reward defendants who succeed in concealing evidence of wrongdoing, since claims will be dismissed before discovery can proceed, whether it is government officials who violate people’s rights, polluters who poison the drinking water, or employers who engage in blatant discrimination. Often evidence of wrongdoing is in the hands of the defendants, and

the facts necessary to prove a valid claim can only be ascertained through discovery.

The *Iqbal* decision overturned 50 years of precedent and will effectively slam shut the courthouse door on legitimate plaintiffs based on the judge's subjective take on the plausibility of a claim rather than on the actual evidence.

At our hearing on *Ashcroft v. Iqbal*, we heard compelling testimony from our witnesses that the *Iqbal* decision has resulted in a substantial departure from well-settled practice in civil litigation. Several witnesses said that the new standard put forward by the U.S. Supreme Court to decide a motion to dismiss a civil complaint amounts to a heightened pleading standard.

Professor Arthur Miller, of New York University School of Law, an expert on civil procedure, testified that "what we have now is a far different model of civil procedure than the original design." We also heard from seasoned litigators. John Vail, of the Center for Constitutional Litigation, stated that there is "no doubt that the Supreme Court intended a sea change in pleading law." Debo Adegbile with the NAACP Legal Defense Fund, referred to the *Iqbal* decision as a "judicially heightened pleading barrier erected by the Supreme Court."

These three witnesses agreed that a legislative response, like H.R. 4115, the "Open Access to Courts Act," is necessary. In addition to our witnesses, a diverse coalition of 36 civil rights, consumer, environmental, and other organizations, support a legislative response to *Ashcroft v. Iqbal*. Mr. Chairman, I ask that a copy of their letter be included in the record following my testimony.

H.R. 4115 would restore the notice pleading standard that existed prior to *Ashcroft v. Iqbal*, a standard that was articulated over fifty years ago in *Conley v. Gibson*. Using the language in *Conley*, the "Open Access to Courts Act" provides that a complaint under Rule 12(b)(6), (c), or (e) cannot be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief."

That was the correct and workable standard for a half-century. It is well understood and practical. The "Open Access to Courts Act" would restore that time-tested standard.

Again, I thank you, Mr. Chairman, for holding today's hearing, and for your leadership on this issue. I look forward to working with you to restore the rights of all Americans by enacting H.R. 4115, the "Open Access to Courts Act."